No. 00100112

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

COLORADO DEPARTMENT OF CORRECTIONS, AND MARGARET HEIL, IN HER INDIVIDUAL AND OFFICIAL CAPACITY,

Petitioners,

v.

JOHN H. CHAMBERS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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33 pp.

EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether the State's power to classify inmates extends so far that it may label them without any form of process, as "sex offenders," when they have neither admitted to, nor been convicted of, any sex offense.

2. Whether the State can artificially cap an inmate's ability to earn "earned time" credits because he refuses to admit that he is a sex offender when he has neither been convicted of a sex offense nor ever admitted to a sex offense.

3. Whether this Court should reverse both the trial court and the appellate court's findings that this lawsuit survives *res judicata* and collateral estoppel attack, despite the fact that both courts applied the correct standard, and despite the fact that Petitioner never cross-appealed the trial court's holding on this issue.

PARTIES TO THESE PROCEEDINGS

The parties to these proceedings are those included in the caption. They include the Colorado Department of Corrections, *petitioner*, and John H. Chambers, *respondent*.

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PRIMARY SOURCES OF LAW[1]

U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1: . . . *nor shall any state deprive any person of life, liberty, or property, without due process of law* . . . . . *passim*

[1] Only those portions of the following sources that are relevant to questions raised are reproduced.

No. 00100112

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Petitioners,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Mr. John H. Chambers requests that this Court deny Petitioner's request that this case be heard. Not only have Petitioners failed to demonstrate any compelling reason why this case should be heard on *certiorari*, they have failed to demonstrate that the lower court committed error at all. In fact, Supreme Court precedent supports what Petitioners hope to reverse; so do those constitutional notions of fundamental fairness which underpin those precedents. Viewed in the light of day, this Court should have little sympathy with Petitioners' request that this case be heard. The Court should grant the petition if, but only if, it wishes to reach the issues raised in Mr. Chambers' *Conditional Cross-Petition for Writ of Certiorari.*

I. Statement of the Case.

A. Crime & Punishment.

John H. Chambers is currently serving a 39 year sentence for crimes committed in January 1984. None of the offenses for which he was convicted involved a sex offense. Nor has Mr. Chambers ever been convicted of a sex offense. He was, however, once arrested for an alleged sex offense in November, 1983. Charges were dropped when the alleged victim, Mr. Chambers' live-in girlfriend, refused to prosecute. *See* Joint Stipulation of Facts and Exhibits ("Joint Stipulation"), Appendix ("App.") I, Introduction & ¶¶ 1-6, 25 & 26 (reproduced without incorporated exhibits).

B. Applicable Parole Scheme.

For that group of inmates convicted of committing offenses in Colorado between July 1, 1979 and July 1, 1985 (the "79-85 Group"), parole is mandatory unless an exception applies. *Thiret v. Kautzky*, 792 P.2d 801, 805 (Colo. 1990). Because an exception applies to Mr. Chambers, in his case parole is discretionary. C.R.S. 1973 §§ 17-2-201(5)(a) & 16-13-101(1) (habitual offender).

Those in the 79-85 Group are entitled to "good time" and "earned time" of up to 120 (total) days every six months. Good time credits vest automatically for those in the 79-85 Group who avoid misconduct. C.R.S. 1973 § 17-22.5-301(1)&(2); *see also Thiret*, at 805 n.7. Earned time is awarded for "substantial and consistent progress in [work and training, group living, counseling/self-help, and the goals and programs of the Colorado diagnostic program.]" C.R.S. 1973 § 17-22.5-302(1).[2] Those who, like Mr. Chambers, are *not* entitled to *mandatory* parole, are

---

[2] For those in the 79-85 Group there appears to be a presumption that earned time will be awarded so long as the inmate participates:

> . . . (2) The department shall develop objective standards for measuring substantial and consistent progress in . . . [the rehabilitative programs] . . . (3) . . . For [those in the 79-85 Group] . . . the department shall review the performance record of the inmate and ***shall grant***, consistent with the provisions of this section, an earned time deduction from the sentence imposed. . . .

C.R.S. § 17-22.5-302(2)-(3) (emphasis supplied). *See, e.g., Bd. of Pardons v. Allen*, 482 U.S. 369, 377, 107 S.Ct.

nevertheless entitled to earn credits to advance the date of parole eligibility: "Good time and earned time credits acquired by [those sentenced under § 17-2-201(5)(a)] establish the earliest date upon which the parole board *may exercise its discretion* whether to place such offenders on parole." *Rather v. Colorado State Bd. of Parole*, 856 P.2d 860, 862 (1993)(emphasis supplied), *citing Thiret*, at 805.

C. The Sex Offender Treatment Program and Classification.

In 1992 Colorado enacted H.B. 92-1021, section 3, which created Colorado's Sex Offender Treatment Program ("SOTP"). C.R.S. § 16-11.7-101. The SOTP became effective on June 2, 1992. *Id.* The SOTP requires that

> [e]ach sex offender placed on parole by the state board of parole on or after January 1, 1994, *shall be required, as a condition of such parole*, to undergo treatment to the extent appropriate to such offender based upon the recommendations of the evaluation and identification pursuant to section 16-11.7-104 or any evaluation or subsequent reevaluation regarding such person during the person's incarceration or any period of parole. . . .

C.R.S. § 16-11.7-105(2) (emphasis supplied). As a prerequisite to participation in the SOTP, inmates are required to confess their sex offenses.

The State concedes that Mr. Chambers is not properly classified as a sex offender for the statutory SOTP. Nevertheless, Petitioners have, since 1987, classified Mr. Chambers as a "sex offender" under one internal regulation or another and, in 1992, began "capping" his ability to earn full earned time credits because he refused to admit that he had ever committed a sex offense. Joint Stipulations, App. I., ¶¶ 7-17, 28 & 29.

D. *Errata.*

Mr. Chambers wishes to call the Court's attention to the following assertions from Petitioner's brief, which Mr. Chambers believes to be in error:

2415, 2420-21 (1987) (word "shall" creates presumption of entitlement to release on parole); *compare with Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466, 101 S.Ct. 2460, 2465 (1981) (statute without definitions, criteria, or "shalls" creates no presumption or entitlement). Based upon DOC's Official Time Computation Reports and Progress Assessment Summaries, Mr. Chambers would seem to be entitled to full earned time, but for its insistence that he participate in the SOTP. Joint Stipulations, App. I, ¶ 29.

1. Page 4: "The Court held that an inmate is entitled to due process before he is classified as a sex offender . . . "

   Mr. Chambers believes that the proper characterization of the Tenth Circuit's holding is that an inmate who has never been convicted of a sex offense, and does not admit to having committed a sex offense, is entitled to due process of law.

2. Page 13: "Mr. Chambers has never alleged that he has been denied parole eligibility."

   A fair characterization of Mr. Chambers' argument is that he is denied parole eligibility when his ability to earn full earned time credits is artificially "capped." *See* Appellant's Supplemental Brief at 8.

3. Page 13, n. 1 & page 15: "Chambers is not even eligible for parole at this time. . . ."; "Chambers has not even served enough time to meet with the Board yet."

   Mr. Chambers recently became eligible for parole and in fact made his first appearance before the parole board. *See* Letter from John H. Chambers, May 2, 2000, App. II, with enclosure.

4. Page 19: "[T]he Court of Appeals failed to grant (or even discuss) the State's defense of *collateral estoppel* and *res judicata*."

   The arguments are discussed in the Tenth Circuit's prior opinion remanding the case to the District Court for factual findings. *See* Petitioner's App. E at E-4. In any event, these arguments were never properly raised on appeal, and so even though the Court of Appeals could have relied upon these arguments in affirming the trial court, it had no duty to discuss the arguments if it found them meritless. *See* Section II.C, below.

II. REASONS FOR DENYING THE WRIT.

A. Introductory Overview.

This Court will grant a petition for writ of *certiorari* in limited circumstances only. In any case, the writ issues only for compelling reasons. RULE 10. Examples of when *certiorari* will be granted are provided in Rule 10, and include circumstances where:

> . . . a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . . [or where] . . . A United States court of appeals has decided an important question of

federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

RULE 10 (portions relating to review of state holdings elided). Although the given examples are explicitly illustrative and do not exclude exercise of discretionary review in other circumstances, they show what the Court means when it says that there must be "compelling reasons" for granting *certiorari*.

Petitioners fail to fit into any category normally associated with cases warranting review. Nor do they demonstrate any analogous compelling reason for granting *certiorari*. Instead, petitioners first argue that prison administrators have a virtually unfettered power to classify inmates that extends even so far as to permit them to take an inmate convicted of one sort of crime, classify him as an "offender" of a very different and highly stigmatizing sort, and then force him to undergo treatment and allow him to suffer all of the additional deprivations of liberty inherent in conviction of that other sort of crime. This Court's holdings about the state's broad powers to classify inmates, and the importance of non-interference with prison administration, have never extended so far.

Petitioners next argue that this Court should intervene to reaffirm the principles of *res judicata* and collateral estoppel. Apart from the fact that "*certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law" (RULE 10), this Court should have little sympathy for an argument that there is something compelling about invoking its discretionary powers to reinstate errors committed by past courts. In any case, a review of the record will show that the courts below not only applied the correct legal standard, but also the right facts when making their respective *res judicata* and collateral estoppel analyses.

B. The *Chambers* Due Process Analysis Is Not Only Correct, it Is Also Consistent with the Decisions of Other Federal Courts of Appeals, State Courts of Last Resort, and this Court's Holdings. There Is Therefore No Compelling Reason to Issue the Writ.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that ". . .*[no] State [shall] deprive any person of life, liberty, or property without due process of law* . . ." U.S.

CONSTITUTION, AMENDMENT XIV.

1. Does an Inmate have a Cognizable Liberty Interest Affected by Classification as a Sex Offender?

Classification as a sex offender affects at least two protected liberty interests: (1) the interest in avoiding stigma; and (2) the interest in avoiding other deprivations flowing from the opprobrious classification, including unwanted treatment, the inability to earn full earned time credits under the terms of the sentence actually imposed, the inability to be considered fairly when his security level is set, and the interest in avoiding any unwarranted taint to his record, conscious or subconscious, when he is finally considered for parole.

a. Avoiding Stigma and Unwanted Treatment.

"[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Bd. of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707 (1972) (quotation and citations omitted). In *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254 (1980), the Supreme Court said:

> None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person, but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. . . . A criminal conviction and sentence . . . extinguish an individual's right to freedom . . . but they do not authorize the State to classify him as mentally ill . . . without . . . due process. . . . [H]ere, the stigmatizing consequences of a transfer to a mental hospital . . . coupled with the subjection of the prisoner to mandatory behavior modification . . . constitute the kind of deprivations of liberty that requires procedural protections.

Vitek, at 494, 100 S.Ct. at 1264. Applying *Vitek* to nearly identical facts, the Ninth Circuit, in *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997), emphatically found that classification as a sex offender implicated a protected liberty interest:

> The parallels between *Vitek* and this case are striking. Hawaii's . . . SOTP authorizes correctional officials to classify certain inmates as sex offenders without a hearing and mandates their completion of an extensive treatment program, which involves their confession to past sex offenses, as a precondition to parole eligibility. We can hardly conceive of a state's action bearing more "stigmatizing consequences" than the labeling of a

> prison inmate as a sex offender. . . . One need only look to the increasingly popular "Megan's laws," whereby states require sex offenders to register with law enforcement officials who are then authorized to release information about the sex offender to the public, to comprehend the stigmatizing consequences of being labeled a sex offender. The classification of an inmate as a sex offender is precisely the type of "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" that the Supreme Court held created a protected liberty interest.

Id. at 828-29, *quoting Sandin v. Conner*, 515 U.S. 472, 482, 115 S.Ct. 2293, 2300 (1995). "[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 94 S.Ct. 2963, 2974 (1974).

The *Neal* court rejected the notion that *Vitek* was to be distinguished on the grounds that, in *Vitek*, treatment of the mentally ill is mandatory, while under the SOTP treatment is voluntary:

> [B]ecause the . . . [SOTP] render[s] the inmate *completely ineligible* for parole if the treatment program is not satisfactorily completed, the attachment of the "sex offender" label to the targeted inmate has a practical and inevitable coercive effect on the inmate's conduct. . . . [T]he stigmatizing consequences of the attachment of the "sex offender" label coupled with the subjection of the targeted inmate to a mandatory treatment program whose successful completion is a precondition for parole eligibility create the kind of deprivations of liberty that require procedural protections . . . *before* being labeled as sex offenders . . .

Neal, at 829-30 (emphasis in original). The coerced participation in a stigmatizing treatment program that suddenly affects a prerequisite to parole eligibility is "qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Quoting Vitek*, at 493, 100 S.Ct. at 1264. "Among the historic liberties protected by the Due Process Clause is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security. . . . Compelled treatment in the form of mandatory behavior modification programs" suggests a deprivation of liberty requiring due process. *Vitek*, at 492, 100 S.Ct. at 1263.

Mr. Chambers has been left with the following choice: he can refuse to participate in the SOTP, hoping to avoid the stigma attached to sex offenders, but lose eligibility for full earned time credits. Restrictions placed upon Mr. Chambers' ability to obtain an advanced parole eligibility date implicate a protected liberty interest. *See Lyncie v.*

Mathis, 519 U.S. 433, 117 S.Ct. 891, 898 (1997) (change in law retroactively rendering class of inmates ineligible for parole implicates liberty interest); *see also* discussion Section II.B.1.b, below. Or, he can assume the opprobrious mantle of sex offender and accept unwanted treatment. Under *Vitek*, *Sandin*, and *Neal*, this too is a forfeiture of a protected liberty interest which cannot be forced upon him without due process of law.

b. *"Stigma Plus"*: Parole Eligibility and Earned Time Credits; Other Deprivations.

An inmate's parole eligibility date, as set under the law in effect as of the date the crime was committed, is "tantamount to a presumptive release date," regardless of whether or not parole will actually be discretionary at that time. *Greenfield v. Scafati*, 277 F.Supp. 644 (D.Mass. 1967) *aff'd mem.*, 390 U.S. 713, 88 S.Ct. 1409 (1968). It is common sense that

> only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. For the confined prisoner, parole — even with its legal constraints — is a long step toward regaining lost freedom . . . [Although it] may be legislative grace for [the legislature] to provide for parole but when it expressly removes all hope of parole upon conviction and sentence for certain offenses, . . . this is in the nature of an additional penalty.

Devine v. New Mexico DOC, 866 F.2d 339, 342-43 (10th Cir. 1989) *quoting Warden v. Marrero*, 417 U.S. 653, 663, 94 S.Ct. 2532, 2538 (1974) (internal quotes and cites omitted).

A prisoner has no constitutional right to be housed at a particular institution. *Meachum v. Fano*, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538 (1976); *Montanye v. Haymes*, 427 U.S. 236, 242-43, 96 S.Ct. 2543, 2547 (1976). A prisoner has no constitutional right to a particular security classification. *Hewitt v. Helms*, 459 U.S. 460, 468, 103 S.Ct. 864, 869-70 (1983); *Moody v. Daggett*, 429 U.S. 78, 87 n.9, 97 S.Ct. 274, 279 n.9 (1976). Nor is there a Constitutional right to release on parole. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979). There is, however, a liberty interest in at least being able to achieve eligibility for parole if parole is provided by statute. *Devine*, at 342-43; *Weaver v. Graham*, 450 U.S. 24, 34, 101 S.Ct. 960, 967 (1981); *Greenfield*, at 646.

DOC's withholding of earned time credits by itself implicates a liberty interest. There is no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for, and hence earn, parole. *Devine*, at 342, *quoting Weaver*, *supra*, at 34, 101 S.Ct. at 967 (*quoting Greenfield*, *supra*, at 646). "By definition, . . . reduction in gain time accumulation lengthens the period that [someone] must spend in prison." *Weaver*, at 32-33. This reduction is impermissible without an adversarial proceeding designed to ensure due process.[3] And, it would also seem apparent that regardless of the fact that Mr. Chambers has no right to any particular security classification, he at least has the right to be considered for such security classifications fairly and in accordance with his duly imposed sentence.

The *Chambers* decision follows the holding in *Neal v. Shimoda*. Although Petitioners try to draw a distinction between *Chambers* and *Neal*, the distinction is at best weak and in any event fails to demonstrate any perceivable rift between circuits which would justify review. Instead, *Chambers* relies upon *Neal*. The cases are best viewed as harmonious: What rift is created by the Ninth Circuit when it writes that

> the stigmatizing consequences of the attachment of the "sex offender" label coupled with the subjection of the targeted inmate to a mandatory treatment program whose successful completion is a precondition for parole eligibility create the kind of deprivations of liberty that require procedural due process.

131 F.3d at 830. No other circuit court cases, state supreme court cases, or cases from this Court are presented to suggest any other meaningful conflict.

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[3] The original enactment of the Colorado Sex Offenders Act ("CSOA"), was struck down by the United States Supreme Court for analogous infirmities in *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209 (1967). In *Specht*, the Supreme Court found both due process and equal protection violations where the prisoner was convicted under one statute of a sex-related offense, but sentenced under another—the CSOA. Since sentencing under the Sex Offenders Act involved an additional factual determination not part of the proof of the underlying offense, the sentencing involved "criminal punishment" requiring a full adversarial proceeding before the court. *Id.* at 608-09; 87 S.Ct. at 1211-12. The central proposition of *Specht* applies directly to Mr. Chambers: Mr. Chambers was never convicted of a sex offense. Any determination that he is a sex offender involves additional fact-finding and, potentially, additional punishment. This requires due process of law. The State cannot be permitted to create administrative end-runs around due process or erect the Iron Curtain between the Constitution and prison inmates forbidden by *Wolff* and this Court's other precedents.

The argument that a court's holding will open the floodgates of inmate litigation, without more, is simplistic and facile. It is easy enough to create hypotheticals in which prison administrators are in fact violating the civil rights of inmates and then also imagine a justifiable inundation with lawsuits. Greater inundation would, in fact, suggest more widespread abuses and therefore support greater judicial intervention. There is nothing to justify a policy which insulates prison administrators more and more from accountability in direct proportion to the probability of a certain number of inmates bringing suit. Nor is there any argument presented by Petitioners to suggest that the mechanisms used to identify frivolous and vexatious suits brought by inmates will cease to function. There is nothing compelling, or even sympathetic, about this argument: The State need only cease doing what it should never have undertaken in the first place, and no floodgates will open.

C. There Is Nothing Compelling in Petitioner's Collateral Estoppel or *Res Judicata* Arguments Warranting Further Review.

Even assuming, *arguendo*, that Petitioners have made forceful arguments as to why they should have prevailed at all stages of these proceedings on their *res judicata* and collateral estoppel arguments, this will not merit further review by this Court: Neither the U.S. District Court for the District of Colorado, nor the Tenth Circuit Court of Appeals, agreed with these arguments, and there is no suggestion whatsoever that either court misapplied or misstated the applicable rules of law. "A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." RULE 10. Instead, both the trial court and the appellate court found that Mr. Chambers' challenge to his classification survived *res judicata* and collateral estoppel scrutiny.

In addition, it is simply untrue that Petitioners "have relied upon . . . [these arguments] . . . at all stages of these proceedings." Petitioners did not cross-appeal the adverse ruling of the trial court to the U.S. Tenth Circuit. Therefore, *res judicata* and collateral estoppel arguments were never the proper subjects of appeal, *per se*. This is so even though the appellate court could have relied upon these theories in affirming the trial court. *See, e.g., Washington*

v. Confederated Bands and Tribes, 439 U.S. 463, 476 n. 20 (1979). The appellate court, instead, reversed the holding of the trial court, choosing not to rely upon these other arguments. In effect, the Tenth Circuit concurred with the trial court's disposition of the *res judicata* and collateral estoppel arguments when it chose not to rely upon those grounds in and instead reversed the trial court's disposition of the due process arguments.

III. Conclusion.

Petitioners have failed to demonstrate any compelling reason why this Court should grant *certiorari*, or even feel sympathy for their position. The due process analysis is consistent with this Court's precedents and with the reasoning of other circuits. The courts below also found the present case distinguishable both factually and legally from the other suits brought by Mr. Chambers, so no compelling justification can be located in Petitioners' *res judicata* or collateral estoppel arguments either. Whatever force these arguments could possibly have, in any event, do not lead towards the type of compelling reason for review on *certiorari*. This Court should deny the petition. If granted, the Court should also hear Mr. Chambers Conditional Cross-Petition for a Writ of *Certiorari*.

APPENDIX I - JOINT STIPULATION OF FACTS AND EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 95-Z-2028

JOHN H. CHAMBERS,

Plaintiff,

v.

COLORADO DEPARTMENT OF CORRECTIONS and
MARGARET HEIL, Individually and in her Official Capacity,

Defendants.

JOINT STIPULATION OF FACTS AND EXHIBITS

I. INTRODUCTION

On January 6, 1999, the United States Court of Appeals for the Tenth Circuit held the following:

> In 1985, Mr. Chambers was convicted of aggravated robbery and attempted theft and, because of prior convictions, sentenced as a habitual criminal to thirty-nine years' imprisonment. In 1992, Phyllis Bachicha, a newly assigned case manager, reviewed Mr. Chambers' CDOC file and discovered a police report indicating Mr. Chambers had been charged with first degree sexual assault in 1983. The case was dismissed without prejudice when the victim decided not to proceed. Based on the report, Ms. Bachicha recommended Mr. Chambers for participation in the SOTP. Under the CDOC Risk Assessment Management Program, Sex Offender Component, Mr. Chambers was judged eligible to participate, and the Sex Offenders Treatment staff classified him S4 on the Sexual Violence Scale: "[i]ndividuals whose history indicates sexual

> assaults or deviance for which they may not have been convicted." However, CDOC did not accept Mr. Chambers in SOTP because he refused to admit to sexually assaultive behavior, a precondition to participation. As a consequence, Ms. Bachicha reduced the amount of earned time Mr. Chambers received from ten to seven days a month. [footnotes omitted] (See Exhibit #1).

After making these findings, the Court of Appeals remanded the case to the district court to make factual findings, stating:

> . . .[W]e are unable to determine from this record whether the legal basis of Mr. Chambers' classification is the internal CDOC policy which may derive from the Act or the prior Sexual Offender Sentencing statute, or is entirely of the CDOC's creation. We also lack any evidentiary basis of that classification to support Ms. Heil's statements. Consequently, without these tracks laid, we are lost to address the merits of this appeal. Indeed, before embarking on the questions presented, prudential concerns should always constrain our 'reach[ing] constitutional questions in advance of the necessity of deciding them." [citations omitted]
>
> We therefore remand this case to the district court to conduct an evidentiary hearing and make factual findings to assist in our resolution of Mr. Chambers' challenge to his SOTP classification. (See Exhibit #1)

II. JOINT STIPULATIONS

A. Evidentiary Basis For Classification

For the purposes of this remand, the parties stipulate to the following facts and exhibits #1 - 16:

1. Chambers' 1983 arrest for sexual assault is referenced in his Pre-Sentence Investigative Report under "Summary of Criminal History". (See Exhibit #2).

2. The charge is also referenced in the police report from the specific arrest. (See Exhibit # 3)

3. In a witnessed, signed statement, the alleged victim wrote:

> "I'm dropping charges because I feel I have no chance to win the case in court. His lawyer would make him look innocent and me be the dog which he is the one. If you let him back on the street there will be another victim." (See Exhibit # 4)

4. The charges were dismissed without prejudice.

5. Since December of 1987, the CDOC has relied solely on the above three documents (paragraphs 1-3) and the CDOC's Risk Assessment Management Program, Sex Offender Component in classifying Chambers as a sex offender. (See Exhibit #5)

6. The above three documents (paragraphs 1-3) comprise all of the evidence of sexual misconduct relied upon by DOC in classifying Chambers as a sex offender. These documents are the only evidence relied upon by Margaret Heil in her affidavit dated March 22, 1996. (See Exhibit #6)

B. Legal Basis For Classification

7. In 1985, the CDOC promulgated CDOC Administrative Regulation 600-1 for the classification of inmates. Part of the new classification system created under this regulation involved the creation of the CDOC's Risk Assessment Management Program, and the Sex Offender Component of the Risk Assessment Management Program. (See Exhibit #7)

8. In January, 1985, the CDOC started its Sex Offender Treatment Program.

9. Prior to 1987, no special classification existed or was applied to inmates whose records indicated allegations of sexual misconduct or arrests for sexual misconduct. Prior to 1987, only inmates with admitted sexual misconduct, or with convictions for sex offenses, were referred for sex offender therapy.

10. The Sex Offender Component of the Risk Assessment Management Program was promulgated in 1987. Under the system established in the CDOC's Risk Assessment Management Program, Sex Offender Component, inmates were classified according to three risk categories. (See Exhibit # 8).

11. In 1987, Chambers was classified as an S-2 - Inmate arrested for a sex offense but not convicted of a sex offense. (See Exhibit # 9)

12. Chambers' 1987 classification as a sex offender was based solely on A/R 600-1 and the CDOC's Risk Assessment Management Program, rather than on any statute. Chambers' subsequent classifications as a sex offender have been based solely on the CDOC's Risk Assessment Management Program, Sex Offender Component, and never on any statute.

13. The same regulation (and criteria) are applied to inmates coming under the Standardized Treatment Program for sex offenders, and the treatment program itself is consolidated.

14. In 1989, and since that date, the DOC Risk Assessment Management Program has classified inmates according to five risk categories, designated "S-1" through "S-5." These five categories were later incorporated into the 1996 Administrative Regulation 700-19, "Sex Offender Treatment and Monitoring Program" which sets forth the criteria under the five risk categories, S-1 through S-5 (Prior S-2 became S-4) (See Exhibit #10).

15. Inmates classified as S-3, S-4, or S-5 are recommended for participation in the Sex Offender Treatment Program ("SOTP") if they are otherwise eligible.

16. The criteria applied to make the S Classification are as follows:

    1. S5 - Individuals with past or current felony sexual offense convictions.
    2. S4 - Individuals whose history indicates sexual assaults or deviance for which they may not have been convicted. These cases often involve plea bargains where the factual basis of the crime involved a sex offense. This category also includes misdemeanor convictions and juvenile convictions for sex offenses.
    3. S3 - Individuals who, while incarcerated, have committed sex offenses against staff or offenders, or who have displayed behaviors which are suggestive of sexual abuse directed towards another.
    4. S2 - Individuals who were arrested or investigated for sexual offenses but not charged, or individuals who were initially coded S5, S4, or S3 but are not recommended for treatment after review by Mental Health Services.
    5. S1 - Individuals with no history or indication of sex offense behavior.

Administrative Regulation 700-19 at 2, Article IV(A) (See Exhibit #10).

17. Since 1989, Chambers' official DOC classification has been S-4, an individual with a history indicating sexual assaults or deviance for which he has not been convicted.

18. On one or more occasions, one or more of his case managers have erroneously listed him as S5 in his working file. However, at all times his appropriate classification was S-4 (See Exhibit # 11).

19. Since 1989, Chambers' classification has always been based solely on A/R 600-1, the Risk Assessment Management Program, and A/R 700-19, rather than on any statute.

20. In March of 1989, Chambers was interviewed for admittance into the SOTP. Chambers was deemed ineligible at that time because he denied committing a sexual offense. (See Exhibit # 12)

21. In May of 1991, it was recommended that Chambers be moved out of the Fremont Correctional Facility because he had repeatedly refused sex offender treatment and "to make room for another inmate who does meet the criteria for SOTP." (See Exhibit #13)

22. Because of his classification as S-4, Chambers cannot qualify for a transfer to a lower security facility.

23. In October of 1991, the SOTP team examined police reports of the sexual assault and continued to recommend SOTP for Chambers. (See Exhibit # 14)

24. Chambers was referred to an SOTP prior to Bachicha's action in 1992.

25. Chambers has never admitted to any sexual misconduct.

26. Chambers has never been convicted of any sex offense.

27. There are convicted sex offenders who do not participate in SOTP and who nevertheless receive the maximum awardable earned time credits.

28. Earned time credits are given to offenders who are willing to take the SOTP but are ineligible through no fault of their own. The SOTP is not offered at every DOC facility. Even where SOTP is available, not every eligible inmate is able to participate due to lack of space in the facilities where it is offered, or due to size limitations of the program, or due to ineligibility due to the length of time remaining before their parole eligibility date.

29. If Chambers had admitted liability and complied with all entry requirements, or if he made the admission now and complied with all entry requirements, he would receive an additional 3 days of earned time credits each month, even if he could not get into the program due to the reasons indicated in paragraph 28 above.

30. Inmates can file a grievance to contest their sexual violence rating. They do so by submitting a grievance form.

31. Chambers used the available grievance procedures to contest his sexual violence rating. (See Exhibit # 15).

32. The grievance procedure consists of three stages: the initial Step I response, a review at Step II, and another review at Step III by DOC personnel.

33. Chambers' grievance to contest his sexual violence rating was reviewed and rejected through all three steps of the grievance procedure. (See Exhibit # 15).

34. The crimes for which Chambers is serving his DOC sentence were committed on or before January 23, 1984 (See Exhibit #16).

C. Legal Basis For Earned Time Decision

35. Until June 7, 1990, the statute which was applied to Mr. Chambers in calculating and awarding earned time credits was § 17-22.5-302, C.R.S.

36. § 17-22.5-405, C.R.S. was enacted on June 7, 1990 and has been applied to Mr. Chambers since that date in calculating and awarding earned time credits.

III. CONCLUSION

The parties hereby stipulate that the stipulations and exhibits contained above comprise all of the evidence which they wish to submit to the Court for its findings on remand. The parties do not request any further hearing.

Approved on this ____ day of September, 1999

_____
John H. Chambers, Plaintiff.

Approved on this ____ day of September, 1999

_____
Richard Byron Peddie
Frascona, Joiner and Goodman, P.C.
Counsel for Plaintiff.

Approved on this 22nd day of September, 1999

Paul Sanzo
Paul Sanzo
First Assistant Attorney General
State of Colorado
Counsel for Defendants.

APPENDIX II - LETTER FROM JOHN H. CHAMBERS, MAY 2, 2000

May 2, 2000

Richard B. Peddie
Attorney at Law
4750 Table Mesa Drive
Boulder, Colorado 80303-5500

Re: **Chambers v. Colorado DOC, et al**
Case No 97-1023

Dear Mr. Peddie,

I hope you are well. I received the copy of the Order denying the state's petition for rehearing. For me and about 1500 other "S-4" inmates, it is a victory. However, it may only be temporary for some of us, because DOC is in the process of devising a way to give us administrative hearings. My Case Manager told me that Case Managers and other staff are being trained in preparation for these hearings. He told me it will probably be some time before the hearings start, because of the training process. I'm using the time to get a defense together. I may be able to get a couple of affidavits from people who talked with the woman I allegedly assaulted. I'm also wondering about arguing that I'm unable to defend against the accusation because it has been so long since the incident occurred. Sure wish you would give me some advice on what I should do. I would appreciate any guidance you would provide.

I met the Parole Board and received a 1 year setback. They were very careful not to mention the sex offender issue, but it did come up, in passing, at the conclusion of the hearing. I was later told by my Case Manager that the Board member wanted me

to know the sex offender issue wasn't considered. I have enclosed a copy of the Board's notice of action.

Mr. Peddie, thank you again for the job you and your legal assistant did on my case. I was very lucky to have gotten you to represent me. You did a great job. Everyone who reads your briefs are impressed. Your briefs were far superior to Paul Sanzo's. Thanks again.

Take care Mr. Peddie, and good luck. I'll let you know how my administrative hearing turns out.

Sincerely,

John H. Chambers

John H. Chambers
Register No. 77158/Unit #2
Limon Correctional Facility
P.O. Box 10,000
Limon, Colorado 80826

NOTICE OF COLORADO PAROLE BOARD ACTION

☐ Initial ☐ Interim Review — Date: APRIL 17, 2000 — Item: 03

Name: CHAMBERS, [redacted] — DOC#: 77153

Location: LIMON CC — Statutory Discharge Date (Pursuant to C.R.S. 18-1-105): 11/08/2018

Offense(s): ROBBERY-FIRST DEGREE; THEFT-FINANCIAL TRANSACTION; THEFT-CONSPIRACY-CRIMINAL CONSPIRACY — Parole Eligibility Date: 05/08/2000

Sentence(s): [redacted] — MRD: 11/08/2018

Plea: [redacted] — Sentencing Type: [redacted]

☒ DEFER TO: 4/2001 (Date)

☐ AGGRAVATING FACTORS/INADEQUATE TIME SERVED (Circumstances of Offense; Needs more time)

☐ PUBLIC RISK (Substantial Parole Risk; prior criminal record)

☐ DISCIPLINARY INFRACTION (Conduct in correctional facility)

☐ RISK CONTROL PROBLEMS

- ☐ Needs continued correctional treatment
- ☐ Psychological reports indicate problems
- ☐ Incomplete/Unacceptable parole plan

☐ WAIVED

Reasons:

- ☐ To Discharge
- ☐ To Complete Program(s)
- ☐ Awaiting Admittance into Program
- ☐ Parole Plan Objectives

☐ Off to County Hold

☐ Transferred

☒ Other

☒ RELEASE

Parole/Reparole to:

Period of:

Effective Release Date:

In addition to C.R.S. 17-2-201 (5) (f) (I) the following Special Conditions are added:

- ☐ Mental Health
- ☐ Drug/Alcohol Program
- ☐ Monitored Antabuse/Alternative if medically able
- ☐ No Alcohol Intake or Possession
- ☐ ISParole ____ days
- ☒ Obtain AA/NA Sponsor
- ☐ No Liquor Establishments
- ☒ No Driving
- ☐ No Contact With
- ☒ No Return to USA
- ☐ Vocational Rehab
- ☒ Day Reporting Center
- ☐ Curfew
- ☐ Electronic Monitoring ____ days
- ☒ No Checking Accounts or other Credit Devices
- ☒ Other

Restitution:

County	Minimum	Amount
[redacted]	$ [redacted]	$ [redacted].00
[redacted]	$ [redacted]	$ 10.00

Last amount paid: [redacted] Total: [redacted]

Payment:

- ☒ To be scheduled by the Parole Officer
- ☐ $ [redacted] Per [redacted]
- ☐ To begin within [redacted] days of release

Release Pursuant to CRS 17-22.5-[redacted]:

- ☐ Positive Behavior
- ☐ Productive Participation in Rehabilitation Programs
- ☐ Completion of Appropriate Treatment Programs
- ☐ Acceptable Parole Plan
- ☐ Other

Parole Board Member Signature:

1) [redacted]
2) [redacted]
3) [redacted]
4) [redacted]
5) [redacted]
6) [redacted]
7) [redacted]

Distribution: Parole Board Member Working File — Inmate — White — Green — Time Comp. DOC Records — Pink — Goldenrod

LIST OF OPPOSING COUNSEL AND OTHER PARTIES REQUIRED TO BE SERVED PURSUANT TO RULE 29

For the Colorado Department of Corrections and Margaret Heil, Cross-Respondents:

MR. KEN SALAZAR, ATTORNEY GENERAL
MR. ALAN J. GILBERT, SOLICITOR GENERAL
1525 Sherman Street
Denver, Colorado 80203

Tel.: 303.866.4745

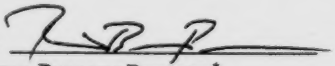
Pursuant to Rule 29.4(a):

UNITED STATES SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
Washington, D.C. 20530

Tel.: 202.514.2000

SIGNATURE OF COUNSEL

Respectfully submitted,

Signed: 

RICHARD BYRON PEDDIE*
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Tel.: 303.494.3000

**Counsel of Record*

No. 00100112

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

COLORADO DEPARTMENT OF CORRECTIONS, AND MARGARET HEIL, IN HER INDIVIDUAL AND OFFICIAL CAPACITY,

Petitioners,

v.

JOHN H. CHAMBERS,

Respondent.

CERTIFICATE OF SERVICE UNDER RULE 29(5)(b)

I, Richard Byron Peddie, counsel for *Respondent/Cross-Petitioner* John H. Chambers, and a member of the Bar of this Court, hereby certify that, on the sixteenth day of August, 2000, I served three copies of each of the following documents: *Brief in Opposition to Petition for Writ of Certiorari*, *Conditional Cross-Petition for Writ of Certiorari* and attached *Motions for Leave to Proceed In Forma Pauperis*, upon each of the following parties:

1. *For the Colorado Department of Corrections and Margaret Heil, Petitioners/Cross-Respondents:* by mailing three copies of each document in a duly addressed envelope, with first-class postage prepaid, to:

MR. KEN SALAZAR, ATTORNEY GENERAL
MR. ALAN J. GILBERT, SOLICITOR GENERAL
1525 Sherman Street
Denver, Colorado 80203

CC: MR. PAUL SANZO, FIRST ASSISTANT ATTORNEY GENERAL
1525 Sherman Street
Denver, Colorado 80203

Tel.: 303.866.4745

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

SIGNATURE OF COUNSEL

Respectfully submitted,

/s/ _____

RICHARD BYRON PEDDIE*
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**Counsel of Record*